No. 12765.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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Opening Statement.

We have read with interest the brief of appellee and earnestly feel that the government has failed to answer the points raised by appellant in his opening brief. In reply to the said brief, we will attempt to avoid repeating the points raised and statements made in our opening brief. However, because of the manner in which the appellee has treated the various points raised by us in our opening brief, we must in certain instances reconsider the evidence disclosed by the transcript and re-analyze the factual content of the record. We ask the court's indulgence in this respect, since we whole-heartedly feel that this type of presentation is required in order to properly show the fallacies of the government's arguments, as will be hereinafter demonstrated.

Government's Treatment of the Facts.

In connection with this portion of the government's brief appearing on pages 3 and 4, we specifically point out that in the following instances the facts have been incorrectly stated by the government.

On page 3 of the government's brief, it is stated that:

> "Erwin Sharpe testified that the defendant had been in the barber shop on three occasions. The first occasion was a Thursday [Tr. p. 43]; he then became confused and said it was about the 28th of February. Upon being shown a calendar he resolved the confusion by stating that the first visit was Thursday, March 2, 1950 [Tr. p. 44]."

In connection with this quoted statement, we direct the court's attention to the fact that the witness Erwin Sharpe did not *first* testify as indicated by the government that the first occasion the defendant was in the barber shop was on a Thursday, and that he thereafter became confused and said it was about February 28th. The record reveals, however, that the witness Erwin Sharpe *first* testified as follows [Tr. p. 40, line 5]:

> "Q. Now, then, when was the first occasion that you cut his hair? A. You mean what day?
>
> Q. Yes. A. What day was it?
>
> Q. Yes. A. Well, sometime in February, the end of February.
>
> Q. And when was the date of the second occasion that you cut his hair? A. It was about a month or so after that."

Thus, it clearly appears from the foregoing portion of the record that the witness Erwin Sharpe *first* testified that the first occasion he cut the defendant's hair was some time in February. Obviously, the government's statement of the evidence on this point is incorrect.

We next pause to analyze the statement contained on page 3 of the government's brief:

> "George Sharpe stated that he was not in the barber shop on February 28th but that he was in the barber shop on March 2nd and on that day his brother Erwin Sharpe cut the defendant's hair [Tr. p. 118 . . ."

If by this statement the government means that George Sharpe himself was not in the barber shop on that date, such a statement is correct, but if the government means to imply from said statement of facts that George Sharpe testified that *appellant* was not in the barber shop on February 28th, the statement is inaccurate and contrary to the record, for on page 90, line 10, George Sharpe's testimony is as follows:

> "Q. Were you in your shop on February 28, 1950? A. No, I was off that day."

* * * * * * * *

Page 90, line 24, by Mr. Reisman:

> "Q. Mr. Sharpe, you don't know of your own personal knowledge whether Mr. Adams was in your barber shop on February 28, 1950, or not, do you? A. Well, I wasn't there that day.
>
> Q. That is exactly what I mean. So you don't know whether he was there or not, do you? A. No, I don't."

Summary of Argument.

A. THAT THE ALLEGED PERJURY OF APPELLANT WAS NOT PROVED BY THE TESTIMONY OF TWO WITNESSES, OR ONE WITNESS AND CORROBORATING CIRCUMSTANCES, AS REQUIRED BY LAW.

B. THAT APPELLANT WAS PREJUDICED BY HAVING THE JURY INSTRUCTED THAT THEY COULD CONSIDER THE INDICTMENT IN CASE NO. 21101 FOR THE PURPOSE OF DETERMINING WHETHER APPELLANT'S TESTIMONY BEFORE THE GRAND JURY WAS KNOWINGLY AND WILFULLY PERJURIOUS.

C. THAT APPELLANT WAS PREJUDICED BY HAVING THE JURY RECEIVE INSTRUCTIONS FROM A JURY HANDBOOK IN THE JURY ROOM OUTSIDE OF THE PRESENCE OF APPELLANT.

ARGUMENT.

A. That the Alleged Perjury of Appellant Was Not Proved by the Testimony of Two Witnesses, or One Witness and Corroborating Circumstances, as Required by Law.

Appellant does not want to be accused of indulging in specious argument. The government in its brief has by that type of argument attempted to coroborate the direct testimony of Erwin Sharpe to the effect that appellant was not in the barber shop on February 28, 1950. It reaches its illogical conclusion in the following manner: Erwin Sharpe testified that appellant was not in the barber shop on Tuesday; that he was there on Thursday, and that he had a little dog with him. George Sharpe then testified that although he wasn't in the barber shop on Tuesday and he, of course, didn't know who was in the barber shop on that day, he recalled appellant had his hair cut by his brother, Erwin, on Thursday; that appellant had a little dog with him and that all three barbers were present. Frank Riggi, the third barber, testified that although he couldn't fix dates, he recalled that the first time he knew of appellant's presence in the barber shop, appellant's hair was cut by Erwin Sharpe; that appellant had a little dog with him and that all three barbers were present.

Without attempting in any way to be facetious, we assert, that the government has properly established and corroborated the fact that appellant was in the barber shop on Thursday, March 2, 1950. BUT THE ISSUE IN THIS CASE IS WHETHER OR NOT APPELLANT TOLD THE TRUTH BEFORE THE GRAND JURY WHEN HE TESTIFIED BEFORE THAT BODY THAT HE WAS IN THE BARBER SHOP

on Tuesday, February 28, 1950. While a date is generally immaterial in a criminal matter so long as the offense was committed within the period of the statute of limitations, in this cause the date is not only material *but it is all important.* This for the reason that it appears from the record without contradiction that appellant was in the barber shop in question on at least three, if not more, occasions. Again, parsing the record, what corroboration is there to the testimony of Erwin Sharpe that appellant was not in the barber shop on February 28? The answer is obvious that there is none—George Sharpe can corroborate nothing as by his own testimony he wasn't there on February 28 and he didn't know who was in the barber shop on that date. Likewise, Riggi is of no help because he cannot fix dates.

We have carefully read and considered the cases cited by the government in its brief and those cases can give it little aid or comfort. It is true that corroboration may be circumstantial, but in this instance there is nothing in the record to support the judgment of conviction but the unsatisfactory confused testimony of Erwin Sharpe fixing the date as March 2. Had the testimony indicated that appellant was in the barber shop on only one occasion then we would say that there was sufficient corroboration by means of circumstantial evidence; however, the testimony of all three barbers indicates that appellant was there on at least three occasions and the testimony varies vastly as to the time elapsed between the various visits. We are not attempting to create confusion in this record—that was done without our help by the unsatisfactory testimony of the barbers. We will have no complain if this court desires to uphold the conviction on the un

corroborated testimony of one witness if it is the desire of this court to abrogate the rules of law that have existed from time immemorial requiring corroboration in perjury cases. But if this court is going to adhere to the long-established principles of law, we must insist that the court apply the recognized rules of logic in its examination of this record and we assert that the unsatisfactory testimony of Erwin Sharpe was not corroborated by proving that appellant was in the barber shop on March 2.

Applying the rules of logic in connection with the facts of this case, the government finds it is in this dilemma: Because Erwin Sharpe, after much hesitancy, fixed the date as March 2, everyone proceeds to forget the allegations of the indictment. The government then attempts to corroborate the date of March 2 by having George Sharpe fix the date as March 2 through a system of mental dead reckoning, *i.e.,* George wasn't there on Tuesday, February 28; Erwin had his day off on Wednesday, and the first day that all three barbers were present was on Thursday, and Thursday was March 2; hence it must have been March 2. George testified greatly about refreshing his recollection from the examination of his records, but when pressed as to what records he examined the best answer that we can find is that the FBI was most desirous of his fixing the date as of Thursday [Tr. p. 115, lines 8-14]. In fact, he testified the date could have been Thursday or Friday [Tr. p. 115, line 14]. To further add to the illogical processes applied, Riggi is brought in and Riggi testified that the first time he observed appellant in the barber shop was at a time when all three barbers were present and that appellant had a little dog with him. This definitely establishes, if the tes-

timony of the barbers is worthy of belief, that appellant was in the barber shop on March 2. But this appellant isn't accused of a crime because he was in the barber shop on March 2. There isn't an iota of evidence, nor is there a logical inference that can be drawn to corroborate Erwin Sharpe's testimony that appellant was not in the barber shop on Tuesday, February 28. George Sharpe's testimony in this regard has no qualitative or quantitative probative value. He just wasn't in the barber shop on Tuesday, February 28, and he doesn't know whether Adams, President Truman or a member of this Honorable Court was or was not in his barber shop on that date. Therefore, up to this point, there is no corroboration. The attempt to use Riggi as corroborative witness is even more futile. He can't fix any dates and the record is completely silent as to whether he was or was not working in the barber shop on the all-important date of February 28, 1950. Thus we can logically conclude that it wasn't established that Riggi was in the barber shop on the red letter day of February 28, 1950; his testimony to the effect that the first time he saw appellant in the barber shop was at a time when all three barbers were present and appellant had a little dog with him is of no probative value for purposes of corroboration, as we have previously shown.

In connection with our research on this phase of the case, we have attempted to find a case with a similar factual situation. That is, a case wherein the defendant was accused of perjury and there were three so-called witnesses to the facts. We feel that the case of *Phair v. U. S.*, 60 F 2d 953, which was cited in our opening brief on page 12 comes closest to the factual situation in the instant case

In the *Phair* case the defendant was accused of perjury in filing a false affidavit to the effect that he was not conducting a saloon business at a given premises, and that whereas at a later date before the United States Commissioner in the presence of three witnesses the defendant had made contrary statements to those contained in his affidavit. However, at the trial of the case, the three alleged witnesses to the defendant's statements made in the United States Commissioner's Office were confused as to the exact statements made by the defendant at said time, and disagreed among themselves as to what was actually said by the defendant. Only one of the witnesses actually testified that the defendant had categorically denied the statements contained in his written affidavit. In treating this problem, the court stated as follows, at page 954:

> "To convict a person of perjury, probable or credible evidence is not enough. It must be strong and clear. In the case at bar there is a serious question as to whether or not the defendant said that he owned the 'property' in question or the saloon conducted on the premises. As above stated, the affidavit states that he did not own the saloon and was in no way connected with the business; but it contains no statement whatever as to the ownership of the real estate. To sum up the testimony on this point, one of the three witnesses, upon whom the government relies, did not remember the words that Phair used as to the ownership of the property or saloon; another testified that he admitted that he owned the 'property', the 'premises', while the third said that Phair stated that he owned the saloon. At most, there was an oath on one side and conflicting testimony as to what Phair later said contrary thereto, on the other, without sufficient attending circumstances. . . ."

We submit that the *Phair* case is conclusive upon the question of whether there exists sufficient corroborating evidence or attending cricumstances in the instant case. As stated by the court in the *Phair* case, we have in the instant case only the unsatisfactory oath of Erwin Sharpe that the defendant was not in the barber shop on February 28th, as opposed to the defendant's positive statement that he was there on that day. The miscarriage of justice in this case stems from the confusion in the mind of the government that by establishing that appellant was in the barber shop on March 2, they completely and irrevocably foreclosed the possibility that he was there on February 28. So far as the alleged corroborating testimony is concerned in this case, appellant could well have been in the barber shop on both February 28 and March 2. It was the duty of the government to establish the guilt of appellant in accordance with the charge made against him in the indictment that his alleged perjury related to his whereabouts on February 28. Corroboration cannot be gleaned from this record unless appellant was presumed to have been guilty before he went to trial. While this court cannot reweigh the evidence, this court must be convinced that appellant was convicted by proper and legal evidence in the manner required by law in a perjury case in order for the judgment of conviction to be sustained. Accordingly, we submit that failure on the part of the government to prove the alleged perjury by the testimony of two witnesses or by one witness and corroborating circumstances requires and necessitates a reversal of the judgment of conviction below.

B. That Appellant Was Prejudiced by Having the Jury Instructed That They Could Consider the Indictment in Case No. 21101 for the Purpose of Determining Whether Appellant's Testimony Before the Grand Jury Was Knowingly and Wilfully Perjurious.

The government has attempted to bolster the challenged instruction by drawing certain unwarranted inferences from the record. (See Appellee's Br., last par., p. 7.) It is true that it was stipulated at the trial that indictment No. 21101 existed; that defendant was also a defendant in that indictment; that Davidian had been a witness before the Grand Jury before the return of that indictment and was to be a witness for the government at the trial; that Davidian had been killed and the date of his death. The stipulations upon which these statements were based appear mainly at pages 146 to 149 of the record. If this court will examine indictment No. 21101, which it has a right to do, it will ascertain that it is a multiple count indictment involving numerous defendants and that appellant in this case was only involved in one count of the indictment. There is nothing in the stipulations above referred to to indicate that Davidian was to be a witness for the government against *this* defendant as opposed to the other named defendants in said matter. We are not permitted to speculate as to which defendants Davidian would have testified against. If the government sought to avail itself of this type of evidence, it was incumbent upon the government to go forward and prove the fact that Davidian was to have been a witness in case No. 21101 against ap-

pellant, and what is more important, that appellant had knowledge of this fact. These things the government completely failed to prove. Therefore, any speculation or consideration by the jury of indictment No. 21101 as a means of ascertaining the appellant's state of mind at the time of his testimony before the Grand Jury was wholly inconsequential and permitted the jury to engage in the wildest type of speculation and surmise, all to the prejudice of the appellant. In view of the foregoing discussion we submit that the statement contained on page 8 of the defendant's brief to the effect that Davidian would have been a witness against the defendant is entirely without foundation in fact and was not proved at the trial. Perhaps the government intended to use the murdered witness Davidian as a witness against appellant, but this fact was never proved at the trial below. In its treatment of this point the government has confused the rules of relevancy, materiality and motive. This is patent from an examination of the cases cited in its brief.

We still believe that the points contained in our opening brief beginning at page 15 remain unanswered by the government and that it would be a useless repetition to again set forth the argument presented in that portion of our opening brief.

In concluding, it is our reasoned view that the challenged instruction relating to indictment No. 21101 was prejudicial to the rights of appellant and is an additional ground entitling him to a reversal of the judgment of conviction.

C. That Appellant Was Prejudiced by Having the Jury Receive Instructions From a Jury Handbook in the Jury Room Outside of the Presence of Appellant.

There is no question from the record or the government's brief that the matters referred to under this heading in relation to the use of the jury handbook actually occurred. We are mindful that this is a point that has not heretofore been passed upon by this court. We believe that both sides have adequately presented the question and that it should be determined by this court so that there will be some standard in the future to govern the conduct of documents that may be received by a jury in the jury room during its deliberations and outside of the presence of the defendants.

Despite the fact that the government attempts to charge us with misinterpreting certain language contained in the handbook for jurors, we submit that said document is before this court in its entirety. We don't know, any more than the government knows, what paragraphs, portions or sentences of the handbook were considered by the jury during its deliberations—but this we know—it was read aloud and considered by the jury.

Conclusion.

It is respectfully submitted that for the reasons hereinbefore set forth in our opening brief as well as in this brief, the judgment of conviction rendered herein should be reversed.

Respectfully submitted,

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Attorneys for Appellant.